NO. 1046

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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM 1943

CELIA STRICKLAND ET AL.
Petitioners

vs.

HUMBLE OIL & REFINING COMPANY ET AL.
Respondents

AND

JASPER POOL ET AL.
Petitioners

vs.

HUMBLE OIL & REFINING COMPANY ET AL.
Respondents


WALTER F. BROWN
2111 Esperson Bldg.
Houston, Texas

O. C. HANCOCK
1103 C. & S. Bank Bldg.
Atlanta, Ga.
Counsel for Petitioners

ROBERT B. BLACKBURN
1208 First National Bank Bldg.
Atlanta, Georgia

E. L. FOWLER
1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia

D. B. PHILLIPS
Norcross, Georgia

B. P. SEAY
Oil & Gas Bldg., Houston, Texas

FLETCHER BROWN
Esperson Bldg., Houston, Texas
Of Counsel

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Petition For a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and Brief In Support Thereof.

To The Honorable The Chief Justice, And Associate Justices Of The Supreme Court Of The United States:

Come now Celia Strickland and the others as plaintiffs in the original action instituted in U. S. District Court for the Southern District of Texas and Jasper Pool and the other named intervenors in the proceedings in that court and pray that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review here the record and judgment enter-

ed by that court on the 4th Day of March, 1944 by a divided bench denying a motion for rehearing and adhearing to a judgment entered by that court on the 17th. day of January 1944 in a cause wherein petitioners were appellants and Humble Oil & Refining Company and others were appellees. (R 566-620).

## OPINION BELOW

The opinion of the United States Circuit Court of Appeals for Fifth Circuit is reported in advance Sheet, Federal Reporter of date, March 13, 1944.--140 Fed. Reporter 2nd. No. 1 -- Page 83 et seq. and the judgment and proceedings in reference thereto are fully set out in the record -- (R 566-573-620-631).

## SUMMARY STATEMENT OF THE MATTERS INVOLVED

### PART ONE

A person bearing the name of Wilson Strickland, was in Texas prior to 1838 and a survey of a one third league of land was made for him and in his name. (R. Page 170 - 171). The quantity of land to which this Wilson Strickland was entitled, was by virtue of a certificate issued by the Board of Land Commissioners of the County of Harrisburg in the then Republic of Texas. (R 215).

This Wilson Strickland signed his name by his X mark.

Letters patent was in the name of this Wilson Strickland and his heirs and assigns on the 3rd. day of July, 1847 and by this letters patent, the state of Texas conveyed this particular one-third of a league of land

to this Wilson Strickland and his heirs and assigns. (R. 172 - 173).

In 1937, Celia Strickland and other original parties plaintiff brought their action in trespass to try title to a portion of the land comprising the one third of a league as patented, as well as to recover damages against Humble Oil and Refining Company and other defendants as named, which was a suit at law, returnable to the District Court of the United States for the Southern District of Texas.

The suit as filed involved a controversy between citizens of different states and involved an amount exceeding the sum of three thousand dollars and the United States District Court for the Southern District of Texas had jurisdiction of the subject matter and the parties. To the suit as filed, the defendants made answer.

The case as made came on to be tried upon the issues as made by the pleadings before a jury duly impanneled, with his Honor, James V. Allred, Judge of the United States District Court for the Southern District of Texas, presiding.

During the progress of the trial and after much testimony had been offered, the Court announced that the testimony would be confined to the question of IDENTITY and upon the conclusion of the introduction of evidence and upon argument of counsel being had, the Court in its charge, restricted the finding of the jury to the one issue:

"Do you find from a preponderance of the evidence that the Wilson Strickland who was the son of Jacob and Priscilla Strickland, of Franklin County, Georgia and under whom plaintiff and intervenors

claim, was the same person as the Wilson Strickland for whom the one third of a league of land in Montgomery County, Texas, was surveyed in 1838?"

Upon considering the evidence as submitted and under the charge of the Court as delivered, restricting the finding to the issue as directed, the jury returned an answer in the negative and the Court entered judgment to the effect that the plaintiffs and intervenors as named never owned any right, title or interest in and to the lands the title to which was in dispute. (R 71-85).

Thereafter, Celia Strickland and other parties plaintiff to the original suit, by and through their attorneys, moved the court to set aside the verdict of the jury as rendered, setting forth in said motion the grounds relied upon. (R 85 - 87).

On the same date, intervenors, P. E. Phillips and other intervenors, filed their motion to have the verdict as rendered set aside upon the grounds as urged. (R. 88 - 89).

Likewise, on same date, Dennie Beckam, and other intervenors filed a motion to have the verdict as rendered set aside upon the grounds as urged. (R 89 - 90).

Thereafter the Court entered judgment overruling the motion for new trial (R 97).

Thereafter, the parties plaintiffs and intervening parties plaintiff represented by the several groups comprising parties affected by the judgment overruling the motions for new trial as filed, gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, appealing from the final judgment entered in said cause and the order overruling the motion for new

trial entered in the stated cases (R 552 to 563) and gave bond, appealing said cause to the United States Circuit Court of Appeals for Fifth Circuit in terms of the law. (R 95 to 108) inclusive.

Thereafter the case came on to be heard upon the errors as assigned and designation of points on appeal. (R 109 - 129) in the United States Circuit Court of Appeals for the Fifth Circuit--Justices Sibley, Holmes and Waller presiding, who upon hearing argument, rendered judgment on January 17, 1944 affirming the judgment of the lower court.

Thereafter and within the time as allowed, the appellants in the stated case, filed a motion for rehearing and upon considering the motion for rehearing, the court by a divided bench, entered judgment March 4, 1944, denying appellants' motion for rehearing--Justice Holmes dissenting.

Thereafter, appellants gave notice of intention to apply to the Supreme Court of the United States for the issuance of a writ of certiorari, directed to the United States Circuit Court of Appeals, Fifth Circuit, appealing said case to the Supreme Court of the United States and requested that the mandate of the United States Circuit Court of Appeals be stayed, pending the filing of the petition for the writ of certiorari and judgment of the court was entered staying the mandate as prayed. (R 622).

Thereafter, and pending the stay of the mandate of the United States Circuit Court of Appeals and before the filing of the petition for certiorari, and while the United States Circuit Court of Appeals for Fifth Circuit retained jurisdiction, appellants in said cause

filed a motion praying that the United States Circuit Court of Appeals for Fifth Circuit, reconsider its action in denying the motion of appellants for a rehearing, and that appropriate order be passed, granting the request for such reconsideration and that judgment be entered reversing the judgment of the lower Court.

That thereafter the motion to reconsider was duly filed in the Clerk's office of the United States Circuit Court of Appeals (Fifth Circuit) and that the Court giving consideration to the motion to reconsider--the court entered judgment and order on the first day of May, 1944, denying the motion to reconsider. (R. 631).

The matters involved are predicated upon assignments of error as related to the ruling of the United States Circuit Court of Appeals (Fifth Circuit) in affirming the judgment of the United States District Court for the Southern District of Texas, in its rulings as to the introduction of testimony and as to the assignment of error upon the exceptions as taken to the charge of the Judge of the United States District Court for the Southern District of Texas, as affirmed by the United States Circuit Court of Appeals (Fifth Circuit).

Petitioners contending that such affirmance affected fixed rules of the law of evidence--and fixed rules of law as related to local law and conflicting with local decisions and in conflict with other United States Circuit Courts of Appeals on the same matter.

## PART TWO

### Basis of Supreme Court's Jurisdiction

### To Review Judgment.

### Questions Involved.

The jurisdiction of the Court is invoked under Section 240 (a) of the judicial Code as amended by the act of February 13, 1925--(28 - U. S. C. A. Sec. 347) which reads as follows:

"In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant to require by certiorari, either before or after judgment or decree, by such lower court, that the cause be certified to the Supreme Court for determination by it, with the same power and authority and with like effect, as if the cause had been brought by unrestricted writ of error or appeal."

Petitioners assign as error:

The judgment of the United States Circuit Court of Appeals (Fifth Circuit) as entered on the 4th day of March 1944, by a divided bench, denying a motion for rehearing and adhering to its judgment, affirming the judgment of the United States District Court for the Southern District of Texas as entered in said original case.

Petitioners contending that the judgment of the United States Circuit Court of Appeals (Fifth Circuit) in affirming the judgment of the lower court, was in

conflict with the decisions of another United States Circuit Court of Appeals:

And also contend that the United States Circuit Court of Appeals, Fifth Circuit, has decided an important question of local law in conflict with local applicable decisions.

Petitioners further contend that the judgment of the United States Circuit Court of Appeals Fifth Circuit, as entered and the rulings therein made are such a departure from the accepted and usual course of judical proceeding, as to call for an exercise of this court's power of supervision.

## PART THREE

## REASONS FOR GRANTING THE WRIT:

### 1st.

The decisions as rendered by the United States Circuit Court of Appeals (Fifth District) by a divided bench in the case at bar is in conflict with applicable decisions of last resort in Texas, which state is within and forms a part of the Fifth United States Circuit Court of Appeals and has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

In that: the decision under review held:

"That Identity of Name did not presumptively show identity of Person." (R 568).

It has been repeatedly held by the courts of last resort in Texas that identity of name is identity of person.

In the case of

Borden Vs. Freeland
189 S. W. 721

It is held:

"Identity of name is prima facie evidence identifying one and the same person."

On page 722 of the same volume:

"It seems therefore that the trial court has a right to conclude that appellants were claiming under a common source, to-wit: J. K. Freeland, appellants' contention--there was no such evidence on the theory that there was no evidence identifying the W. T. Wooten who was the heir of J. K. Freeland as the W. T. Wooten who conveyed to J. A. Commack. The contention ignored the rule which treats identity of name as prima facie evidence, identifying one and the same person."

See also:

McDoel Vs. Jordan et al
Civil Court of Appeals -- Texas
151 S. W. 1178 (4th. head note)

Pyle Vs. Davison et al
Civil Court of Appeals -- Texas
116th. S. W. 823

which last case holds:

"Identity of name is prima facie evidence of person." These Texas cases are in perfect harmony with an unbroken line of state policy as related to cases sounding in trespass to try title to lands, holding that when the name of the patentee and the name under whom claimants assert title are indentical that the presumption arises -- that the persons are the same.

In the case at bar, the person who was the patentee of the lands in controversy, bore the name of Wilson Strickland (R 172).

This Wilson Strickland signed his name by his X mark. (R 404 - 405).

The person under whom appellants in the court below asserted title bore the name of Wilson Strickland (R 174) and this Wilson Strickland signed his name by his X mark. (R 177).

The names were identical and the signatures were identical.

The rule in Texas relating to identity in name as being presumptive of identity of person was binding upon the Circuit Court of Appeals for the Fifth Circuit.

The decision as rendered in the lower Court to the effect that identity in name did not presumptively show identity of person was not only in conflict with local decisions, but was also in conflict with decisions of other circuit courts.

In the case of

Marimeis Vs. Sheeran
31st. Federal Rpt. 976

It is held:

"In view of identity of names in actions of husband and wife, the court must assume husband was the plaintiff in one of the actions."

This case was from the Circuit Court of Appeals Second Circuit, and reversed the judgment of the district court holding to the contrary. See also:

Faust Vs. United States
163 U. S. 452.

Above cited case from the District Court Northern District of Texas.

Miller & Son Vs. Petrocelli
236 Federal Reports Page 846

From Ninth Circuit Court of Appeals, affirming the case above noted.

In the ruling as complained of -- the Court says: "That there is evidence in the case of several Wilson Stricklands in life at or about the critical time, four of them in Georgia -- they were clearly different persons and yet, all had the patentees name. The identity of name does not prove the patentee to have been appellants' Wilson Strickland any more than each of the others."

In making this statement, the court evidently overlooked that it affirmatively appears from the record that every person who bore the name of Wilson Strickland, whether in Georgia, or elsewhere, who it was claimed to have been in life at the critical time -- other than appellants' Wilson Strickland, had been definitely accounted for and definitely put out of the picture by the facts as stipulated to be true. (R 159).

The statement made by the court, however, is not germane to the exact point which was being decided. The question before the court on this assignment of error was, did the burden of proof shift at the point at which a prima facie case was made?

Whether any other person bearing the name existed or did not exist, would have to be in the nature of a

rebuttal to the prima facie case and we insist that in making proof of this counter contention the burden was on appellees.

The court in the same connection says that the evidence does not show where the patentee went, or what became of him. The court evidently overlooked the record. Wilson Strickland, the patentee, was not shown to have been in Texas after 1838 -- He was definitely not in Texas in 1847 and had not been for some time. (R 403).

Appellants' Wilson Strickland died in Arkansas, adjoining state to Texas, in 1841. (R 212). This was about three years after the date of the last appearance of Wilson Strickland, the patentee in Texas. (R. 403).

We contend that with no proof to the contrary, that Wilson Strickland, the patentee, was fully accounted *for in the death of appellants* Wilson Strickland in Arkansas in 1841.

2nd

For the further reason:

That the decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding that "Identity in name when proven did not shift the burden and that upon a prima facie case being proven, that the burden was not shifted to the opposite party." (R. 568) was in conflict with applicable local decisions and was in conflict with the decisions of other Circuit Courts -- and the decision as made departed from the accepted and usual course of judicial proceedings.

It has been held:

"The burden of evidence, or as it is sometimes termed, the burden of going ahead with the evidence is controlled by the logical necessities of making proof which a party is under at the time, the burden being always on the party against whom the decision of the tribunal would be given if no further evidence was introduced -- and this burden so continues until the party with the burden of proof establishes a prima facie case by proof of facts, which either alone, or in conjunction with presumptions of law or fact legally applicable will result in an established case, if not rejected by counter evidence.

When such a prima facie case is established the burden shifts to the party who has not the affirmative."

Corpus Juris 22 Sec. 22.

This statement of the law has been uniformly followed by many jurisdictions and has been expressly adhered to by the Texas Courts.

Smith Vs. Gillon
15 S. W. 796

In which it is held:

"Appellees having made a prima facie case, the burden of the proof shifts."

In the case at bar appellants in the court below contend that upon proving that the person under whom they claim title, bore the identical name and had the identical signature of the person who was the patentee of the lands in dispute, that a perfectly good prima facie case was made and that upon such proof being made, the burden of evidence shifted and it then became the

duty of the opposite parties to prove that the Wilson Strickland under whom appellants in the court below asserted title, was not the Wilson Strickland, the patentee; and appellants contended in the court below that the trial judge in the U. S. District Court in Texas erred in not so charging. (R 127).

The District Court judge in his charge emphasized over and over as to the burden which plaintiffs and intervenors were to carry, but was silent as to when and at what time the burden shifted. (R 49 etseq.).

The charge of the court was excepted to and error was assigned thereon (R 127) and the judgment of the U. S. Circuit Court of Appeals in affirming the decision of the District Court in so far as related, was in conflict with local decisions applicable and was in conflict with established rules of law.

The Chamblee case as cited in the decision is not applicable. In the Chamblee case, the names were not identical; there was only a similarity in name and the Texas Court makes the distinction holding that when the name is identical, the presumption existed and where there is only a similarity, other proof is required.

Appellants in the court not only proved identity in name and signature, but also proved that the claimant lived in Tennessee at one time. (R 333).

Wilson Strickland, the patentee served in the army of the Republic of Texas in a company of Tennesseeans (R 303). Appellants' Wilson Strickland fought in thhe war in Texas and acquired land while in Texas. (R 374).

The Wilson Strickland who fought in the Army of the Republic signed his name by mark. (R 312).

Wilson Strickland, the patentee, arrived in Texas in 1829 and was not shown to have been in Texas after April 18, 1838. (R 404 - 405).

He was definitely absent from the state of Texas on August 18, 1847 and had been for some time prior to that date. (R 402). Appellants' Wilson Strickland was not shown to have been in Georgia from July 1828 (R 350) to the year 1839. (R 369) so it appears that the conclusion of the court in passing upon this presumption are not sustained by the record.

3rd.

For the further reason:

It appears from the record that in the trial of the case in the United States District Court, Mrs. A. C. Barnes, as a witness for defendants, was allowed to testify over timely objections made by plaintiffs.

1st.

"That her father had told her that he was a little boy when he came to Texas."

2nd.

"That her father from time to time discussed with her his people, who they were, and where they came from and that he was always talking about his people."

3rd.

"That her father told her that he came to Texas to live with his uncle Wilson Strickland."

4th.

"That her father told her that her uncle couldn't

read nor write, but he got somebody to write a letter back to the witness's grandfather to ask for the witness' father or some of the other boys to come out here and live with him and that he had a place here and expected to stay in Texas and wanted some of them to come and live with him."

5th.

"That her father told her that her grandfather was too small to come -- too young to leave home, but there was a caravan of eastern North Carolina people coming through there and they said if he would let him come, they would see that he got with his uncle."

6th.

"That her father told her that he came to Texas and lived with his Uncle Wilson Strickland on the land that his Uncle Wilson Strickland got from the government."

7th.

"That her father told her that he lived with his Uncle Wilson Strickland on the place that his Uncle Wilson Strickland got from the government until this man by the name of Vince came there to live with him and he was very disagreeable."

8th.

"That her father told her that they couldn't get along good together and her father was worried terribly about it, because Vince was there, but of course he was there, and he had to stay there -- he couldn't get rid of him."

9th.

"That her father told her that Mr. Vince got rid

of Wilson Strickland and her father came in one day and asked where his uncle was and Mr. Vince told him he had gone back to North Carolina and her father said, "I don't believe that."

10th.

"That her father told her that he wanted to stay on the land and that he told Mr. Vince that his uncle had given him a piece of this land promised his father that if he would let him come, he would give him some of it, enough to make a home there with him and that her father said, I will just get on whatever part of it you want me to and stay there until I hear from my uncle until he comes back,, and that Vince said, "Well, your uncle is never coming back."

11th.

"That her father told her that he said to Vince, "Well, I will stay here until I hear from him" and that Vince said, "No, you won't. I want this land for myself. I bought all of it and I don't want you here any more than I did him."

12th.

"That her father told her that he then said, "Well I don't know nobody. I don't have no place to go, and that Vince said, "Well, you have to go away from here because this is my land."

13th

"That her father told her that he then went away, working around at any thing he could do thinking he could hear from his uncle, but he didn't hear from him, so he finally decided he would go back to North Carolina and see if he could find him and when he went

back, then they said that they hadn't heard of him since he left there to come to Texas -- hadn't heard of him since he came back to live on this land -- hadn't heard of Uncle Wilson Strickland since he left North Carolina to come to live there on that government land. He left there to come to live on it the rest of his life and he never went back there like Vince said he did."

14th.

"That her father said to her: "Well, they were selling land there in North Carolina in Stricklandville and he bought him a little piece of land there and thought he would stay there until he heard from his uncle, but that her uncle didn't come back."

15th.

"That her father told her that he got to thinking about his uncle and wondering where he was and that her father said he believed he was still in Texas and he thought he would come back to Texas and hunt him up."

16th.

"That her father told her he came back to Texas to hunt his uncle Wilson Strickland -- when he got here he just went around different places."

That exceptions to the evidence as offered was made to each separate statement on the ground that the same was hearsay and self serving as set forth in assignments of error 1 - 16. (R 109 - 114).

That the Circuit Court in passing upon these assignments of error (R 570 - 571)--decided that this evidence was competent and sustained the judgment of

the District Court in overruling the objections as made to this evidence.

The decision of the Circuit Court in holding that the evidence of the witness, Mrs. Barnes, as competent and the decision of the court in affirming the judgment of the District Court in overruling the objections to the testimony as offered was in conflict with applicable local decisions.

In the case of
Byers Vs. Wallace
87 Tex. - page 503
28 S. W. 1059.

The Court says:

"That the declarations of William Wallace under whom plaintiffs claim--to the effect that he had a nephew in Texas named William Wallace who was killed at Goliad in the Fannin massacre -- the evidence shows that if the declarations were true, the declarant was the only heir of the property to whom the declaration related.

It was a self serving declaration made in the interest of the declarant and should have been excluded."

In the case at bar it appears from the record in this case that the witness, Mrs. Barnes, the declarent, was the daughter of a deceased nephew of the Wilson Strickland referred to and was a claimant to the land in controversy and that if the declaration was true, the declarant would have inherited an interest in the property.

It appears from the record that this witness was a daughter of an alleged Alfred Strickland who was a grandson of an alleged Absolam Strickland. (R 495 - 496) and that the alleged Wilson Strickland was a son of this Absolam Strickland. It also appears that she,

the witness testified that she was claiming the land in controversy and had formerly had a suit at Conroe for this land. (R 504).

It also appears from the record that in the suit in which this witness was a party, that the verdict as rendered was:

"That there was not a Wilson Strickland, son of Absalom and Sarah Strickland, of Duplin County, North Carolina." (R 159).

Clearly, the testimony of this witness was hearsay of the rankest kind -- was self serving in the extreme and was highly predudicial and should have been excluded.

The Circuit Court of Appeals was bound by the ruling in the Byers case as noted, and should have followed it.

Erie Railroad Company

Vs.

Thompkins 304 U. S. Page 64

which expressly hold that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."

Justice Holmes seems to have taken this view, where on the motion for rehearing he dissented from the first decision as rendered.

The court in commenting on this evidence, says: "While this evidence was vivid and if believed, forceful, it was admissible though hearsay for the purpose for which it was offered."

We can see no purpose that would authorize hearsay or self serving declarations. The evidence went be-

yond the scope of mere kinship, and was objectionable, even under the citation referred to in the court's decision, and was certainly in conflict with the Byers case.

The Circuit Court says in its decision "We have considered the charge of the court and do not think it unduly stresses the burden of proof as being on appellant. Its reference to the ring of a true coin as compared to the dull thud of a false one in charging upon the claims of descent and relationship might have been omitted, but it applied equally to the evidence of each side."

The District Court asserted in its charge, (R 49), "The burden of proof in this case is upon the plaintiffs and intervenors to show by a preponderance of the evidence that Wilson Strickyand, the son of Jacob and Priscilla and under whom they claim was the same person as the Wilson Strickland for whom the land was surveyed in 1838. In other words, gentlemen, the burden of proof is upon the plaintiffs and intervenors to establish by a preponderance of the evidence the affirmative answer to this issue I am submitting to you. The burden is not on the defendants to show that Wilson Strickland, the son of Jacob and Priscilla Strickland, the person under whom the plaintiffs claim is not the same person as the Wilson Strickland for whom the land was surveyed. The burden is upon the plaintiff and intervenors to establish that fact and if they haven't done so, you should return a verdict for the defendants and answer No--" In another portion of the charge (R 53) the court says: "I have the suggestion to make to you and I am sure you have carefully weighed and considered this testimony as it has gone along and analyzed it in your own minds without having discussed it among yourselves and in taking into consideration all the factors

that I have mentioned in considering the credibility of the witnesses and the reasonableness of the theories advanced and of the testimony of the witnesses as to whether or not the plaintiffs and intervenors have discharged the burden of proof placed upon them to establish by preponderance of the evidence the affirmative of this issue; that it comes down in the final analysis to the convictions at which jurors arrive.

I am sure at some time or other and I mention this by way of illustration only, you gentlemen have come in contact with a counterfeit coin. In all appearances, it might have the appearance of being a genuine coin, deceiving the naked eye and lots of people pass it and pay it out for purchases, with an honest belief that it is a genuine coin, but if you flip it in the air or cast it out on the table, there is a certain jingle or ring to it if it is a genuine coin and there is a thud if it is not a genuine coin and so as you carefully weigh this testimony, not that it might constitute any reflection upon the plaintiffs and intervenors in the case or upon these other parties who advanced in another court the theory that a certain alleged Wilson Strickland was the real Wilson Strickland, you might ask yourselves the question: "Does it jingle with the ring of genuieneness and of truth and of reasonableness, or does a consideration of the evidence on the whole result in a sort of thud that brands it as improbable and unreasonable and not genuine."

The first part of this charge unduly stressed the burden as was related to appellants by giving undue emphasis and by reiterating the burden as it was related to the plaintiffs and intervenors and did not properly deal with the question of burden as was related to the

defendants. The last portion of the charge was highly prejudicial and improper.

The court stressed its application to the evidence as it was related to the plaintiffs and intervenors and did not in this portion of the charge refer to the evidence of defendants. The illustration gave the jury the right to consider their experiences with facts not proven by the evidence as shown to exist by the record--to-wit, the experience they might have had in coming in contact with spurious coin and while the court disclaimed any intention of reflecting upon the integrity of plaintiffs and intervenors, yet the illustration and comment as made by the court could have but one effect, to-wit, that the contention as made by the plaintiffs was of the spurious type.

It must be borne in mind that all the evidence as offered by the plaintiffs and intervenors in this case was documentary, except and save only that which was related to the family tradition that they were of kin to the Wlison Strickland, who was the son of Jacob and Priscilla Strickland and that this Wilson Strickland had gone to Texas.

The language used by the court in connection with the charge and the illustration as made was hurtful in its nature -- was not justified by the evidence as introduced by plaintiffs and intervenors. It added an ingredient of poison that was death dealing in its nature and should be reversed.

## CONCLUSION

The petition for Certiorari should be granted in order that this court may review the decision of the United

States Circuit Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

Oliver C. Hamrick

Walter F. Brown

Attorneys for
Celia Strickland et al. and
Jasper Pool et al.
Petitioners.

ROBERT B. BLACKBURN
1208 First National Bank Bldg.
Atlanta, Georgia

E. L. FOWLER
1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia

B. P. SEAY
Oil & Gas Bldg., Houston, Texas

D. B. PHILLIPS
Norcross, Georgia

FLETCHER BROWN
Esperson Bldg., Houston, Texas

Of Counsel for
Celia Strickland et al. and
Jasper Pool, et al.
Petitioners in Certiorari

In the case under consideration there can be no doubt as to the proof offered by appellants in the court below, being sufficient to support the contention.

That the Wilson Strickland under whom appellants claimed the title to the lands involved and the Wilson Strickland for whom the survey was made were one and the same person.

They both bore the identical given, and sur-name. They both signed their names by His X mark.

The Wilson Strickland under whom appellants claim title was the son of Jacob and Priscilla Strickland, of Franklin County, Georgia (R 298). This Wilson Strickland signed his name by his X mark. (R 177) and was born Jan. 14, 1783. (R 293).

This Wilson Strickland lived at one time in Tennessee. (R 333).

This Wilson Strickland is not shown to have been in Georgia after July 1828, at which time he receipted his father's estate for $307.00 (R 368) and until 1839. (R 363).

This Wilson Strickland by family tradition went to Texas. (R 187 - 197 - 248 - 275 - 276 and 283).

This Wilson Strickland fought in the army of the Republic of Texas and acquired lands in Texas. (R 374).

This Wilson Strickland made a Will in 1841 in which, after making special devises, he willed the residue of his estate to his brothers and sisters and to the descendents of brothers and sisters. (R 173 - 177).

This Wilson Strickland died in Arkansas which was an adjoining state to Texas, in November 1841. (R 292).

The Wilson Strickland for whom the land was surveyed appeared in Texas in 1829. (R 388) the year after the last appearance of appellant's Wilson Strickland, in Georgia in July 1828).

This Wilson Strickland served in the army of Texas in a Company of Tennesseeans. (R 303).

This Wilson Strickland made a contract with Allen Vince on April 16, 1838 to recover a league and a labor of land and suit was brought upon this contract to enforce it, in which it was alleged that only a third of a league had been secured.

This Wilson Strickland signed his name to the contract by his X mark.

This Wilson Strickland for whom the land was surveyed is not shown to have been in Texas after April 16, 1938. He was definitely absent from the state of Texas in 1847 and had been for some time theretofore. (R 402).

We submit that under this record evidence, a presumption in law arises that appellants Wilson Strickland and the Wilson Strickland, the patentee, were one and the same and that upon proof of these facts, a perfect and dependable prima facie case had been made and that appellants would be entitled to prevail.

We further contend that upon this record evidence as to identity and that upon such a prima facie case being made that the burden of evidence shifted and that under the rules of law as applicable and as hereinbefore

cited, in the petition for certiorari, it then became the duty of the Appellees to assume the burden of making a counter showing.

We contend that the court holding to the contrary was reversible error. We further contend that the charge of the Court as complained of was objectionable for the reasons set forth in petition for certiorari. We further contend that the deductions of the court in commenting upon the question of identity are not in harmony with the record.

The evidence of the witness, Mrs. A. C. Barnes, as it is fully set out in the petition for certiorari was hearsay -- was self serving and extremely hurtful and prejudicial -- in fact, with the evidence of Mrs. Barnes out of the picture there was no evidence on the part of appellees, of probative value sufficient to rebut the presumption of law as related to identity as proven by the appellants.

None of the alleged persons who it was claimed to have borne the name of Wilson Strickland, other than appellants Wilson Strickland, were proven to be illiterate. No signatures of these other claimants were offered. No Bibles were introduced showing the date of birth or date of death of these other Wilson Stricklands.

Appellants Wilson Strickland was the only Wilson Strickland who had the ear marks of Wilson Strickland, the patentee; and his birth and death and place of burial was established by unimpeachable evidence.

The decision of the United States Circuit Court of Appeals as herein complained of, is we most urgently

contend, in conflict with local applicable decisions, in conflict with the decisions of other United States Circuit Court of Appeals touching the same matter and is a departure from the accepted and usual course of judicial proceedings and we contend is not in accord with any previous decision of any local court or any United States Circuit Court of Appeals, or for that matter, of the United States Supreme Court, touching the same matter.

Respectfully submitted,

Alex L. Hamrick

Walter F. Brown

Attorneys for
Celia Strickland et al. and
Jasper Pool et al.
Petitioners.

ROBERT B. BLACKBURN
1208 First National Bank Bldg.
Atlanta, Georgia

E. L. FOWLER
1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia

B. P. SEAY
Oil & Gas Bldg., Houston, Texas

D. B. PHILLIPS
Norcross, Georgia

FLETCHER BROWN
Esperson Bldg., Houston, Texas

Of Counsel for
Celia Strickland et al. and
Jasper Pool, et al.
Petitioners in Certiorari

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1046

CELIA STRICKLAND, ET AL., *Petitioners*,

v.

HUMBLE OIL & REFINING COMPANY, ET AL., *Respondents*,

AND

JASPER POOL, ET AL., *Petitioners*

v.

HUMBLE OIL & REFINING COMPANY, ET AL., *Respondents*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VINSON, ELKINS, WEEMS & FRANCIS,
WM. A. VINSON,
JOHN C. TOWNES,
J. C. WILHOIT,
P. F. GRAVES,
R. E. SEAGLER,
PITTS & LILES,
J. L. PITTS,
E. E. TOWNES, JR.,
*Attorneys for Humble Oil & Refining Company, et al., Respondents*

ALPHA LAW BRIEF CO., HOUSTON

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## LIST OF AUTHORITIES

IN THE

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:*

Respondents, HUMBLE OIL & REFINING COMPANY, ET AL., who were defendants and appellees below, respectfully submit that the Petition for a Writ of Certiorari should be, in all things, denied.

### Opinion Below

The Circuit Court of Appeals by its unanimous opinion rendered January 17, 1944, and reported in 140 Fed. (2d)

83-87 (R. 566-570), affirmed the March 5, 1942, final judgment of the District Court for the Southern District of Texas (R. 66-85), which was entered pursuant to an unpublished memorandum opinion by the trial judge which reviews some of the more pertinent facts and applicable laws prohibiting recovery by petitioners (R. 61-66).

## Statement of the Case

This is a local civil action in "Trespass to Try Title" between private parties, brought in 1937 by petitioners as alleged heirs of *one* Wilson Strickland who died in 1841, seeking to recover land in Montgomery County, Texas; which land was patented by the State of Texas to *a* Wilson Strickland in 1847, and of which respondents and their predecessors in title had been bona fidely claiming and exercising ownership for many years.

The *sole issue* to which the evidence was confined on the trial, and which was submitted to the jury (under Rule 49, FEDERAL RULES OF CIVIL PROCEDURE) was whether the Wilson Strickland under whom petitioners asserted their claim, was the same man as Wilson Strickland, the Texas patentee.

The jury found that he was *not the same man* (Final Judgment, R. 66, 71). *This single fact issue* determined the entire controversy, and judgment was accordingly entered for defendants, respondents here (R. 66-85).

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This is one of innumerable suits filed against these respondents by many mutually antagonistic groups and families, each seeking to recover the same land from respondents ninety years after the Patent was issued to Wilson Strickland—during all of which period neither petitioners nor any other persons ever asserted any claim against the title of respondents and their predecessors in interest.

Each such family presented a different Wilson Strickland and each contended that their particular Wilson Strickland was the 1847 grantee of the land sued for. Many of the suits were filed in the United States District Court and many in the State District Court of Montgomery County, Texas (R. 129-141, 153-161).

The motivating cause of said suits was the 1932 discovery of oil in the Conroe Oil Field (R. 383), and the consequent newspaper publicity (R. 218, 285, 290).

Petitioners were parties to the consolidated Cause No. 18,253-A which was tried to a jury in the State District Court from August of 1940 to August of 1941; and many members of petitioners' family affirmatively appeared therein and introduced all of the deposition evidence relied upon by petitioners in the present case (R. 136-150, 157-167). Special Issues were submitted to the jury in the State Court with reference to the thirteen Wilson Stricklands there presented (including the Wilson Strickland urged by petitioners), and the jury found that none of them was the Wilson Strickland, Patentee (R. 137-141, 157, 160). Respondents recovered judgment in the State Court case.

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The land in controversy is a portion of one-third of a league of land which was purchased by Wilson Strickland, to whom, and to whose heirs and assigns, it was patented July 3, 1847 (Ex. 2, R. 172). His right to purchase the stated quantity of land at the price paid was predicated on, and was by reason of, statutory proof by said Wilson Strickland of the following facts:

(1) He immigrated to Texas in 1829 (during the time the 1825 Colonization Law of Coahuila and Texas was in effect);

(2) He was a single man;

(3) He was actually a citizen of Texas on March 2, 1836, when Texas declared her independence of Mexico;

(4) He was a continuous resident of Texas from his 1829 immigration to his March 16, 1838, proof before the Board of Land Commissioners (Ex. 7, R. 215-216).

The uncontroverted documentary proof, concerning the Wilson Strickland under whom petitioners claim, conclusively established that petitioners' Wilson Strickland could not have been the Wilson Strickland, patentee. The memorandum opinion of the trial judge demonstrates this conclusion (R. 60-66).

## Reply to Petitioners' "Reasons for Granting the Writ"

1st.

The decision of the Circuit Court of Appeals in this cause is not in conflict with any Texas court decisions nor with any decision of any other Circuit Court of Appeals. The Circuit Court of Appeals in this cause did not hold "That identity of name did not presumptively show identity of person," as stated at page 8 of the petition for certiorari. (See Opinion R. 567-568.)

In BYERS v. WALLACE (Tex. Sup. Ct.), 28 S.W. 1056, at page 1058, the Supreme Court of Texas said in a case quite similar to the present litigation:

> "It is the law of this character of cases that the plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendants' title; that is, the plaintiffs must have shown a right in themselves, or

failed, notwithstanding it did not appear that the defendants had any right whatever."

The Board of Land Commissioners of Harrisburg County, Republic of Texas, issued a certificate to Wilson Strickland, pursuant to his March 16, 1838 proof, reading in part:

> "This is to certify that Wilson Strickland appeared before me, the Board of Land Commissioners for the County of Harrisburg, and proved according to law that he *arrived* in this country *in eighteen hundred and twenty-nine* and that he *is a single man* and entitled to one-third of a league of land. * * * " (Ex. 7, R. 215-216.)

The findings by the Board of Land Commissioners (1) that Wilson Strickland immigrated to Texas in 1829; (2) that he was a single man, and (3) that he was entitled to one-third of a league of land, are conclusive of said facts and are binding on all persons claiming under said certificate and the July 3, 1847, patent issued by virtue thereof.

> Southwestern Settlement & Development Co. v. Village Mills (Tex. Civ. App.), 245 S.W. 975;
> McNeil v. O'Connor, 79 Tex. 227, 14 S.W. 1058;
> Houston Oil Co. v. Hayden (Tex. Sup. Ct.), 135 S.W. 1149;
> Burkett v. Scarborough, 59 Tex. 495.

In addition, it was mandatory that said Wilson Strickland be a resident of Texas from the inception of his claim for a headright (his immigration in 1829) until his March 16, 1838, appearance before the Board of Land Commissioners.

> Act of December 14, 1837, Secs. 13 and 16;
> Linn v. State of Texas, 2 Tex. 317;
> Board of Land Commissioners v. Reily, Dallam Reports (Tex.) 381.

Petitioners' Wilson Strickland was a married man from 1809 to 1840 (Ex. 16, R. 293; Ex. 15, R. 292), did not leave the State of Georgia after 1809 (R. 376) and therefore could not have been the Wilson Strickland, patentee.

Respondents affirmatively proved the presence of the petitioners' Wilson Strickland in the State of Georgia, where he lived, during the period from 1829 to 1838 when the true Wilson Strickland was required to be, and found to be, in Texas. (Between 1832 and his 1841 Will; Ex. 50-52, R. 352-357, and his 1841 Will, Ex. 3, R. 174; *1834:* Ex. 54, 55, R. 358; *1835:* Ex. 56-57, R. 358-359; *1836:* Ex. 59, R. 360; *1837:* Ex. 62, 63, R. 363-374; *1838:* Ex. 64, 65, R. 364-365.)

Respondents further proved that, whereas, the true Wilson Strickland executed each document by his mark, the petitioners' Wilson Strickland *signed* each instrument shown to have been executed by him (with the sole exceptions of his March 9th, 1841, will and a March 15, 1841 deed—which instruments were executed shortly before his death). (Ex. 58, R. 359; Ex. 43, R. 316-321, 322, 326, 335; Ex. 44, R. 342-344; Ex. 47, R. 348-350; Ex. 66, R. 365-366.)

The testimony of petitioners and others show that contemporaneously with Wilson Strickland, the patentee, and petitioners' Wilson Strickland, there were still other Wilson Stricklands in the State of Georgia, as well as in other states. (Petitioners' testimony: R. 193-194, 196; 278-281; 285-286; 288-289; other testimony: R. 410-478; 495-521; 526-529; Ex. 107-110, R. 521-525; Ex. 115-118, R. 532-538; Stipulation: R. 157-160; Court's Memo, R. 65 (N. 6).) Petitioners even contended that there were two Wilson Stricklands (one besides their own in Gwinnett County, Georgia. (Appellant's brief 199-201; Court's Memo, R. 65.)

SOUTHWESTERN SETTLEMENT & DEVELOPMENT CO. v. VILLAGE MILLS (Tex. Civ. App.), 245 S.W. 975, states the true rule concerning the presumption of identity of person

arising from identity of name. In that case, the Frederick Lewis was found and recited in the certificate of the Board of Land Commissioners to be a single man, whereas appellants' Frederick Lewis was a married man. The court held:

> "It is not a rule of law but only a rule of evidence. If the evidence casts no suspicion on the transfer a presumption arising from the identity of names is conclusive; but *if the evidence raises an issue against the identity of person, then the burden rests on the person advancing the title to prove the identity* and that is appellants' condition in this case. * * * "
>
> * * *
>
> "It appears then from the face of appellants' title, on facts revealed by this title, that the *presumption of identity* of person because of identity of name *does not arise* in appellants' favor. On the face of this title, the Frederick Lewis named in the certificate *could not have been* the Frederick Lewis named as grantor in the Samuel Rogers deed."

See, also:

> McNeil v. O'Connor, 79 Tex. 227, 14 S.W. 1058;
> Malone v. Dick, 94 Tex. 419, 61 S.W. 112.

The only two items of similarity between the Wilson Strickland, Patentee, and petitioners' Wilson Strickland were (1) that they had the same name, and (2) that the Texas Wilson Strickland signed each of his documents by mark and petitioners' Wilson Strickland signed the last two of his numerous documents, by mark.

The evidence not only raised an issue against the identity of petitioners' Wilson Strickland and cast suspicion thereon, but conclusively demonstrated that he *could not have been* the Wilson Strickland, Patentee.

Petitioners cite several cases at pages 9 to 11 of their petition, but they are not authorities for the position taken.

BOWLIN v. FREELAND, 289 S.W. 721 (relied on by petitioners and erroneously cited as BORDEN v. FREELAND, 189 S.W. 721), was a case in which no evidence contrary to the claimed identity of person was introduced, nor was any suspicion cast upon the identity. The partial and incorrectly copied excerpt from the opinion in the petition is not contrary to the holding by the Circuit Court of Appeals in the present case.

MCDOEL v. JORDAN, 151 S.W. 1178, relied on by petitioners, held merely that the identity of names was sufficient identification " * * * in the absence of other evidence * * * ." There was no contrary evidence.

PYLE v. DAVISON, 116 S.W. 823, was another case cited by petitioners and in which there was no other evidence of identity, nor any suspicious circumstances. The grant referred to in a conveyance was actually dated May 27, 1835, but erroneously referred to as dated May 28, 1835.

MAREINISS v. SHEERAN, 31 Fed. (2d) 976 (erroneously cited at page 10 of the petition as MARIMEIS v. SHEERAN, 31 Fed. 976), was another case involving no contrary evidence nor suspicious circumstance. The excerpt from said case was incorrectly copied at page 10 of the petition.

FAUST v. UNITED STATES, 163 U.S. 452, 41 L. Ed. 224, cited by petitioners, presented no issue of identity. The defendant was indicted as *Faust*, whereas, his true name was *Foust*. The defendant was personally present in court and the rule of idem sonams was correctly applied.

MILLER & LUX, INC., v. PETROCELLI, 236 Fed. 846, to which petitioners refer, involved the estate of "*Pietro Spina*, sometimes known as *Peter Spino*." Additional proof of identification was made and no contrary evidence appeared. The principle of idem sonams was applied.

It is interesting to note that at page 11 of the petition it is stated that all other Wilson Stricklands had been definitely accounted for and put out of the picture by stipulated facts, but that petitioners failed to mention the fact that their Wilson Strickland was likewise so accounted for and definitely put out of the picture in the same State Court trial (R. 158).

2nd.

The decision of the Circuit Court of Appeals in this cause is not in conflict with any Texas court decisions nor with any decision of any other Circuit Court of Appeals in holding, in effect, that the burden of proof does not shift to the defendant in a Trespass to Try Title action.

The Supreme Court of Texas has clearly announced the rule:

> "*The burden of proof never shifts from the plaintiff to the defendant, but it is upon the plaintiff throughout the trial* to establish by a preponderance of the evidence the affirmative of the issue or issues upon which he relies for a recovery. There is an old and well-settled rule that the burden of proof rests upon the plaintiff to establish his case by a preponderance of the evidence."
>
> Boswell v. Pannell (Tex. Sup. Ct.), 180 S.W. 593, 595; Byers v. Wallace (Tex. Sup. Ct.), 28 S.W. 1056, 1058; See, also, Authorities, supra.

Petitioners overlook the definite difference and distinction between (1) burden of proof and (2) burden of evidence.

22 Cor. Jur., 67-69.

The quotation from 22 COR. JUR., at page 13 of the petition should be continued to the conclusion of the sentence, partially quoted, so that the rule might be accurately stated:

"When such a prima facie case is established the *burden of evidence* is shifted to the party who has not the affirmative of the issue, although the position of the *burden of proof* is in no way affected."

22 Cor. Jur., Sec. 21, page 76-78.

SMITH v. GILLON (Tex. Sup. Ct.), 15 S.W. 796, relied upon by petitioners at page 13, involved land granted in 1835 to *Asahel Savery*. An 1837 deed (properly proven) recited that the grant was to *Asal Savory* and said deed was signed by *A. Savery*. Appellees were claiming under the 1837 deed, and appellant claimed as a devisee of the original grantee. There was no evidence to dispute the deed in any way, except the spelling of the name—which was sufficiently explained by evidence in the record so that " * * * it should remove any reasonable suspicion, if any, which might arise as to the identity * * * ." The case is therefore inapplicable to the present case.

Petitioners here were never able to make a prima facie case, as the very documents on which they necessarily relied, that is, the above mentioned March 16, 1838 certificate by the Board of Land Commissioners, and the Patent issued pursuant thereto, showed that the true Wilson Strickland immigrated to Texas in 1829 and was a single man, whereas, petitioners' Wilson Strickland never left the State of Georgia after 1809 (until shortly before his 1841 death in Arkansas) and was a married man from 1809 to 1840.

Thus the evidence on which petitioners relied, and by which they were conclusively bound, not only did not make a prima facie case in their behalf, but destroyed any possibility of their recovery.

At page 14 of the petition, it is stated:

"Appellants' Wilson Strickland fought in the war in Texas and acquired land while in Texas (R. 374)."

The witness on whom petitioners relied for such statement was a member of their family (R. 164, 166, 370), and testified " * * * that he fought in battles out here in Texas and then returned to Georgia and married Miss Polly Connally; he married her about 1809; and after his marriage remained there in Georgia and died about 1841" (R. 376).

The war by which Texas won her independence from Mexico was in 1836.

3rd.

Petitioners' 3rd point involves a purely procedural matter of introduction of evidence which, under the facts and law hereinabove mentioned, could not conceivably affect petitioners' right to recover.

Under the record and under the law the evidence was admissible. The witness was repeating declarations of a deceased party made at a time when he knew all of the facts concerning the land; knew that Allen Vince had claimed in the 1840's that the declarant's Wilson Strickland had sold him the land; and said declarant was making no claim to the land (R. 503-504).

As stated by the trial judge in his March 24, 1942 Memorandum overruling appellants' motion for new trial:

> "The Court had previously admitted similar testimony in behalf of plaintiffs and intervenors over objections of defendants. Had the Court not admitted such testimony in behalf of plaintiffs and intervenors, their case could hardly have gone to the jury at all.
>
> "In my judgment the evidence complained of was admissible upon the issue of identity; but if it was not admissible, then plaintiffs and intervenors had no basis whatever upon which to take their case to the jury" (R. 96).

**4th.**

Petitioners complain of a further procedural matter, to-wit: the Court's Charge.

The court repeatedly told the jurors that they were the sole and exclusive judges of the facts, the credibility of the witnesses and the weight to be given their testimony, and expressly instructed the jury to "determine this case according to your own notions under the Court's Charge as to the law and as to what the facts are. The jury is to determine that, exclusive of any interference or suggestion from the judge."

The court properly told the jury that the burden of proof was upon the plaintiffs and intervenors to establish the affirmative of the issue submitted. The Charge of the Court was entirely without error.

California Ins. Co. v. Union Compress Company, 133 U.S. 417, 33 L. Ed. 730, 738;
Blanton v. Great Atlantic and Pacific Tea Co. (C.C.A. 5th), 61 Fed. (2d) 427, 430;
Boswell v. Pannell (Tex. Sup. Ct.), 180 S.W. 593.

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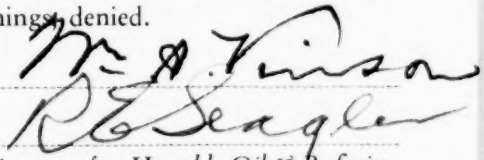
There are numerous inaccuracies in the Petition for Certiorari. We feel, however, that the foregoing will thoroughly demonstrate that under the facts and the law, petitioners could not recover in any event, and we refrain from further lengthening this brief to correct petitioners' inaccuracies.

## Conclusion

This is a fact case in which the jury found that petitioners' Wilson Strickland was not the Wilson Strickland, Patentee of the land in controversy. The uncontradicted evidence compelled said jury finding and prohibited any other answer to

the sole fact issue submitted. In the light thereof, the alleged evidentiary and procedural errors, even had they occurred, would be immaterial.

We respectfully submit that the Petition for Writ of Certiorari should be, in all things, denied.



*Attorneys for Humble Oil & Refining Company, et al., Respondents*

VINSON, ELKINS, WEEMS & FRANCIS,
JOHN C. TOWNES,
E. E. TOWNES, JR.,
J. C. WILHOIT,
P. F. GRAVES,
Esperson Building, Houston, Texas;

PITTS & LILES,
J. L. PITTS,
Conroe, Texas,

*Of Counsel for Humble Oil & Refining Company, et al., Respondents*

NO. 1046 108



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WALTER F. BROWN
2111 Esperson Bldg.
Houston, Texas

O. C. HANCOCK
1103 C. & S. Bank Bldg.
Atlanta, Ga.
Counsel for Petitioners

ROBERT B. BLACKBURN
1208 First National Bank Bldg.
Atlanta, Georgia

E. L. FOWLER
1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia

D. B. PHILLIPS
Norcross, Georgia

B. P. SEAY
Oil & Gas Bldg., Houston, Texas

FLETCHER BROWN
Esperson Bldg., Houston, Texas
Of Counsel

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## PETITION FOR REHEARING

Come now Celia Strickland and the others named as Plaintiffs in the above entitled cause and present this, their petition for rehearing and pray that the Court reconsider its action in denying the petition of Celia Strickland, et al as Petitioners Vs. Humble Oil & Refining Company Et Al. and Jasper Pool Et Al, Petitioners Vs. Humble Oil & Refining Company, Et Al., for the writ of Certiorari.

By order of the Court as passed in said matter, of date, October 9, 1944 and in support thereof, respectfully show:

## PART ONE - PRELUDE

In presenting this application for rehearing, it is rather difficult to forecast the theory upon which the petition for certiorari in the instant case was denied.

The Court, having failed to write an opinion, and not being required so to do, it is only possible for counsel to suggest to the Court some of the pertinent facts which the court evidently overlooked and also suggest the possibility of its having overlooked what we most earnestly contend - Controlling decisions and statutes as applicable.

The only issue before the Court - for review, upon the errors as assigned, is:

WAS THE WILSON STRICKLAND, THE SON of JACOB and PRISCILLA STRICKLAND OF FRANKLIN COUNTY, GEORGIA, one and the SAME PERSON as the WILSON STRICKLAND TO WHOM a ONE-THIRD of a LEAGUE of LAND WAS AWARDED BY THE BOARD OF LAND COMMISSIONERS OF HARRISBURG in the THEN REPUBLIC OF TEXAS ON THE 16th DAY OF APRIL, 1838.

## PART TWO:

Specific reference to parts of the record to which the Court's attention is called:

Record Page (170 - 171)

Wherein it is shown affirmatively

That a person bearing the name of Wilson Strickland was in Texas: Prior to 1838, and a survey of a

one-third league of land was made for him and in his name,

Record 215:

The quantity of land to which this Wilson Strickland was entitled was represented by a certificate issued by the Board of Land Commissioners of Harrisburg County in the then Republic of Texas.

Record 404.

This Wilson Strickland signed his name by His X mark.

The last record evidence of this Wilson Strickland as being in Texas. was on April 16, 1838. (Record 404) at which time he made a contract with a person by the name of Allen Vince.

This Wilson Strickland was affirmatively beyond the limits of the State of Texas on August 18, 1847, and had been absent for some time prior thereto. (Record 402 - 403 and 404.)

A one-third of a league of Land in Harrisburg County, Texas, was patented in the name of this Wilson Strickland, his heirs and assigns on July 2, 1847 and was sent to Robert Campbell on July 27, 1847. (Record 399.

This was the same Robert Campbell who filed suit for Vince against this Wilson Strickland (the patentee) and swore that this Wilson Strickland was not within the limits of Texas on August 18, 1847 and had been so absent from Texas and beyond the reach of personal service for some time prior thereto. (Record

402 - 403 and 404) and this oath was made just three weeks after the letters patent were sent to Robert Campbell. (Record 423).

At the time at which Robert Campbell first wrote concerning the letters patent as the attorney for Vince on Sept. 29, 1846 he stated that Allen Vince was in Alabama and that before his departure he could not procure from him the necessary information.

(Record 392) This was about one year before the letters were finally sent to Campbell. (Record 399).

In this connection, we call the Court's especial attention:

To stipulation of counsel: (Record 550).

"That administration on the estate of Allen Vince, deceased, was taken on application of Robert Campbell who was appointed administrator in 1850. That during the administration there was no disposition of the property as patented to Wilson Strickland and that in 1860, the estate was closed and all the property of Vince was turned over to Susan Pratt and that there was no conveyance of the property of Wilson Strickland out of Pratt.

That in 1860 J. R. Campbell conveyed the property in controversy to a man named Phillips and that there was no deed out of Phillips. (Record 550).

A fair inference that at the time Campbell entered the suit against Wilson Strickland in 1847, a steal was contemplated - certain it is under the undisputed facts, the presumption in law would arise that Wilson Strickland from April 16, 1838 to August 1847 was not in

Texas and had not been heard from and that a legal presumption of law arose that this Wilson Strickland died, in the interim and was dead at the date at which the suit in 1847 was filed, and at the time the letters patent were issued in the name of Wilson Strickland.

In 1937 Celia Strickland and other original parties plaintiffs filed their suit against the Humble Oil & Refining Company and other defendants as named to recover a portion of the lands as conveyed to the Wilson Strickland under the letters patent as issued, as hereinbefore shown.

These plaintiffs contend that they were the heirs at law of legatees under the Will of a certain Wilson Strickland who was the son of Jacob and Priscilla Strickland and that Wilson Strickland in whose name the letters patent to the lands in Texas was issued, was one and the same person, as appellants' Wilson Strickland.

This Wilson Strickland was the son of Jacob and Priscilla Strickland, of Franklin County, Georgia. (Record 294 - 395).

This Wilson Strickland was born January 14, 1783. (Record 293).

This Wilson Strickland during a portion of his life lived in the State of Tennessee. (Record 333).

This Wilson Strickland receipted his father's estate in July 1828 for $307.00. (Record 368).

This Wilson Strickland, by family tradition, went to Texas.

(Record 187 - 198 - 248 - 275 - 276 and 283).

This Wilson Strickland, by family tradition, fought in the army of the Republic of Texas. (R - 374).

A person bearing the name of Wilson Strickland appeared in Texas in 1829 just a few months after the date at which Wilson Strickland the son of Jacob and Priscilla Strickland receipted his father's estate for money in July 1828.

This Wilson Strickland fought in the army of the Republic of Texas in a Company of Tennesseeans. (Record 303 - 1.)

This Wilson Strickland signed his name by his X mark.

This Wilson Strickland was the person to whom a certificate was issued by the Land Commissioners of Harrisburg County, Texas, to the effect that he was entitled to a one-third of a League of land, being the lands now involved in the case at bar. This Certificate was issued 16th. day of March 1838.

This Wilson Strickland was never by the record or by any other proof, ever to have been heard of, or to his having ever been in Texas AFTER April 16, 1838 at which time he made the contract with Vince as shown by (Record 402 - 404).

Wilson Strickland, the son of Jacob and Priscilla Strickland, of Franklin County, Georgia, died in the State of Arkansas, an adjoining state to Texas, on Nov. 9, 1841, which was just three years after the last appearance in Texas of the Wilson Strickland for whom the survey of the lands in dispute was made and so far as the record in this case discloses, the Wilson Strickland

to whom the lands in controversy was awarded, was never heard of after April 16, 1838.

Clearly, under this undisputed record evidence, the only deductable inference, as a matter of law and as a matter of conscience, leads to the absolute conviction that the Wilson Strickland who was the son of Jacob and Priscilla Strickland of Franklin County, Georgia - and the Wilson Strickland to whom the lands in controversy were awarded was one and the same person.

We confidently contend that the court in reaching the conclusion that the petition for certiorari should be denied, overlooked the facts as herein specifically set forth.

## ARGUMENT AND CITATION OF AUTHORITIES

We contend that the United Circuit Court of Appeals, in the decision under review, erred in holding that:

"Identity of name, when proven, did not shift the burden of evidence and that upon a prima facie case being proven that the burden was not shifted to the opposite party. (Record 568).

Exceptions were taken to the charge of the court upon the trial of this case in the U. S. District Court for the Southern District of Texas, plaintiffs contending in the exceptions to the charge of the Court, as fully set out, on pages 49 et seq. of the record:

1.

That the trial judge placed undue prominence in giving undue emphasis to the burden of proof - in that

the court gave undue emphasis as to what was the burden to be carried by plaintiffs and intervenors and gave the load greater weight than was authorized by unusual repetition and did not give the corresponding duties devolving upon defendants, as to the shifting of the burden. (Record 49).

Upon considering this assignment of error, the United Circuit Court of Appeals for the Fifth Circuit, in affirming the judgment of the lower court, says in the first head note of the decision as rendered in this case and as reported in:

140th Federal Reports, 2nd Series, Page 83 et seq. in considering this exception, says:

"Identity of name is some proof of identity of person, but the weight and effect of such proof varies with the circumstances."

On page 85 of this Volume, Justice Sibley, in holding that the burden did not shift, gives as his reason that there was evidence of the existence of several Wilson Stricklands in life about the critical time and that identity of name does not prove the patentee to have appellants' Wilson Strickland any more than each of the others.

Error is assigned upon the ruling as made.

The judgment of the U. S. Circuit Court as rendered, is in conflict with established law, not only by the decisions of last resort in the Texas courts, but likewise in conflict with a uniformity of decisions of other United States Circuit Courts as well as the Supreme Court of the United States.

We submit that the error complained of, related to the status of the parties at the conclusion of plaintiffs'

testimony. If a prima facie case had been made, the burden resting upon plaintiffs had been carried.

Upon so being carried, the status at this juncture as related, changed, and the case upon going forward cast the burden of evidence upon the defendants to PROVE the NEGATIVE.

The Justice of the Fifth U. S. Circuit Court of Appeals, evidently lost sight of the real question involved, to-wit: Were the plaintiffs entitled to have the Court charge the jury as contended by plaintiffs?

"That if the plaintiffs had made out a prima facie case and had established that the Wilson Strickland under whom THEY claimed bore that same name of the Wilson Strickland, for whom the survey was made in 1838, and that the Wilson Strickland, (the son of Jacob and Priscilla Strickland) lived at the critical time and was by circumstances shown to have been in Texas, that then a prima facie case would have been made out and the burden of evidence would at this point, shift, and the defendants would be required to show by a preponderance of evidence that the Wilson Strickland, (the son of Jacob and Priscilla was NOT the Wilson Strickland for whom the survey was made.

The reasons assigned by the Jurist of the Fifth Circuit were related to the weight of the evidence submitted as a whole - and his deductions were not germane.

We contend that the plaintiffs were entitled under every rule of the game to meet the defendants upon a parity as related to respective burdens and most earnestly contend that under the rulings as made and as excepted to, they were denied a substantial right.

In this contention, we are amply supported, not only by the courts of Texas, the forum in which the case was tried, but by uniformity of decisions of other U. S. Circuit Courts of Appeals, including decisions from the bench of the United State Supreme Court.

TEXAS CASES HOLDING THAT:

"Identity of name is prima facie evidence identifying one and the same person."

Bowlin Vs. Freeland
289 S. W. - 721

McDoel Vs. Jourdan Et Al.
Civil Court Of Appeals - Texas.
151 S. W. - 1178 - (4th headnote)
Pyle Vs. Davison - 116th S. W. - 823

Decisions of other U. S. Circuit Court of Appeals holding to the same effect:

Mareiniss Vs. Sheran
31 Fed. (2nd. 976)
2nd Circuit

Miller & Son Vs. Petrocelli
236 Federal Report - 846
From the Ninth Circuit:

Faust Vs. U. S.
163 U. S. 452.

This last case being decided on appeal from District Court from the Northern District of Texas.

Counsel for defendants in their main Reply Brief on page 8 contend that these cases are not applicable because there was no other evidence, nor any suspicious circumstances appearing.

This contention is not germane to the exact point which was before the Court.

The question before the court on this assignment was - Did the burden shift?

The cases herein cited hold that identity of name without attendant circumstances support the presumption and make a prima facie case and shifts the burden.

Justice Sibley, while practically admitting that identity of name is sufficient - yet he says on page 85 - 140 Fed. 2nd)

"Other identification is necessary and the burden of showing it is not shifted from the plaintiffs."

We fear that the jurst in making this deduction, is rather confused - and fails to see the differential existing:

The real rule being:

Where there is only a similarity in name other identification is necessary - but where the names are identical - as in the case at bar, the prima facie case is made without other identification. The Chamblee case, as cited by Justice Sibley, falls under the rule relating to cases where there was only a similarity in names, and the Texas Court makes the distinction, holding that when the name is identical, the presumption exists and where there is a similarity in name, other proof is required, but be this as it may, other and convincing circumstances were proven in the case now under consideration.

Plaintiffs' Wilson Strickland, in addition to having the identical given and Surname - and the identical

method of signature as that of the patentee, it was proven:

That he receipted his father's estate for money in 1828 in Georgia just a few months before the Wilson Strickland appeared in Texas in 1829. Record 363). That he had prior to that time been a resident of Tennessee. (Record 333).

That he went to Texas (Record 187 - 197 - 283). That he fought in the Army of the Republic of Texas. That he was not shown to have been in Georgia in 1829 (Record 292).

The lands in dispute were surveyed for this Wilson Strickland in 1838. THIS Wilson Strickland was not shown to have been in Texas after 1838 and there was no evidence that he had ever been heard of after that date.

Appellants' Wilson Strickland died in Arkansas in 1841 and we contend that in his death THE Wilson Strickland for whom the survey was made was fully accounted for and that under the proven circumstances, in addition to identity of name and signature that a perfectly good and dependable prima facie case was made in favor of appellants, and we contend that the U. S. Circuit Court of Appeals in holding to the contrary, was reversible error.

2nd.

We invite the Court's especial attention to the evidence of a Mrs. A. C. Barnes, a witness offered by the defendants.

The evidence of this witness is set out on pages 495 to 511 of the record.

The evidence as offered was excepted to on the ground that it was hearsay and self serving, as shown by Exception for appellants' assignments of error, Number 16 and 18 inclusive (Record 109 to 114).

A fair sample of this evidence is set forth on pages 497 and 498 of the record where this witness testifies:

"That her father was a very small boy when he came to Texas - that her uncle got somebody to write a letter back home to ask my father or some of the other boys to come out here and live with him. My grandfather thought my father was too young to leave home, but there was a carravan of eastern North Carolina people coming through there and they said if they would let him come, they would see that he got to his uncle.

A careful review of this evidence will show that it is a product of an imaginary mind.

The testimony of this witness consisted entirely of narrative statements alleged to have been made to her by her father, witness saying that she did not talk to anyone but her father and her exposition of the alleged facts and her conclusions equal the fiction in the Arabian Nights and are equally as incredible.

We invite the Court's especial attention to the fact that this witness attempted to connect herself up with a certain Wilson Strickland of Duplin County, N. C. and that she was claiming the land in controversy and that she had formerly had a suit at Conroe, Texas wherein she claimed an interest in the land. (Record 504).

It also appeared from the record that the verdict as rendered in the case in which this witness was a party in which verdict it was found:

"That there was not a Wilson Strickland, a son of Absalom and Sara Strickland of Duplin County, N. C." (Record 159).

In other words, the ancestor in title of this witness was MYTH and DID NOT EXIST.

This testimony was excepted to in Exceptions Numbered 1 to 16 inclusive. (Record 109 to 114) on the ground that it was rank hearsay and self serving.

The U. S. Circuit Court of Appeals in passing upon these assignments of error, held, that his evidence was competent, and sustained the judgment of the District Court in overruling the objections.

We contend that the judgment of the U. S. Circuit Court of Appeals in holding that this evidence was competent, was reversible error - and in support of this contention, we call the court's especial attention to the case of:

Byers Vs. Wallace
82nd. Texas - Page 503
28th. S. W. - Page 1059

The decision of the Circuit Court was in conflict with this decision and was in conflict with the established rules of law as related to the asmissibility of evidence.

The Byers case being the law of the forum was binding upon the Circuit Court of Appeals and should have been adhered to.

The testimony of this witness was extremely hurtful and predjudicial and constituted the crux of the attempted counter showing of the defendants.

Justice Sibley in commenting upon this testimony, classifies it as being vivid and seems himself to have had some doubt, but finally held, that though it was hearsay, it was admissible.

In this thought, however, Justice Holmes dissented, and we call the Court's especial attention to the dissenting opinion of Justice Holmes in this case.

## CONCLUSION

The case as now requested to be considered for a rehearing, is of signal importance.

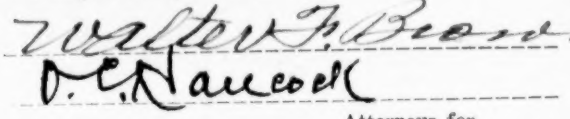
The subject matter involved represents property values running into millions of dollars.

We feel confident that the court, in denying the petition for certiorari evidently overlooked the specific portions of the record to which the Court's attention is now called and overlooked the decisions as herein cited.

We also respectfully contend that the court in reviewing this motion for rehearing will conclude that the decision of the Circuit Court of Appeals as excepted to, was in conflict with local applicable decisions and also in conflict with the decisions of other U. S. Circuit Courts of Appeals, touching the same subject matter and that the decision as excepted to is a departure from the

accepted and usual course of judicial procedings which will incline this court to exercise the Court's power of supervision in santioning the writ of certiorari.

Respectfully submitted,



Attorneys for
Celia Strickland et al. and
Jasper Pool et al.
Petitioners.


ROBERT B. BLACKBURN
1208 First National Bank Bldg.
Atlanta, Georgia

E. L. FOWLER
1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia

B. P. SEAY
Oil & Gas Bldg., Houston, Texas

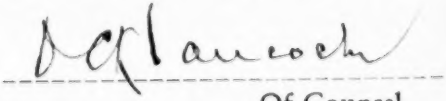
D. B. PHILLIPS
Norcross, Georgia

FLETCHER BROWN
Esperson Bldg., Houston, Texas

Of Counsel for
Celia Strickland et al. and
Jasper Pool, et al.
Petitioners in Certiorari


## CERTIFICATE OF COUNSEL

I, O. C. Hancock, of counsel for the above named petitioners, Celia Strickland Et Al. and other parties petitioners, as designated in the foregoing petition for rehearing, do hereby certify that the foregoing petition for rehearing of this cause, is presented in good faith and not for delay.



Of Counsel.